

This letter discusses transportation and delivery charges. See 86 Ill. Adm. Code 130.415.  
(This is a PLR.)

July 29, 2016

**RE: COMPANY**

Dear Xxxxx:

This letter is in response to your letter dated February 3, 2016, in which you requested information. The Department issues two types of letter rulings. Private Letter Rulings (“PLRs”) are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department’s regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter (“GIL”) is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. 2 Ill. Adm. Code 1200.120. You may access our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) to review regulations, letter rulings and other types of information relevant to your inquiry.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY, for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110, governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither COMPANY, nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

Pursuant to our discussion, on behalf of COMPANY we submit the following letter for your consideration as it pertains to the Department’s proposed regulations related to the taxability of shipping charges.

COMPANY is an online grocery delivery service. COMPANY is based in CITY 1, Illinois and operates in several US cities, including the Chicagoland area. COMPANY is owned by ABC, and delivers from its CITY 2 warehouse which is the order acceptance location. Orders can be placed on COMPANY’s website or using the COMPANY app. After completing a shopping order and as part of the checking out process, customers are given two options for obtaining/receiving the groceries: (1) have the groceries delivered to a residential or commercial address for a charge, which varies depending on the amount of the order, the type of customer, the zip code of the delivery address and whether the customer has separately purchased a PRODUCT, or (2) pick up the groceries at a bricks and mortar location (PUP) for a lesser charge than option 1. Separately, and not as part of the grocery ordering/checkout process, a customer can sign up for a PRODUCT, which is a prepaid “all inclusive” delivery charge for 3 month, 6

month or 12 month periods. With PRODUCT, the customer pays the delivery charge upfront which then gives the customer “free” deliveries (part of option 1 above) to the customer’s residential or commercial address for the time period of the PRODUCT. For those customers that order frequently, the PRODUCT provides the customer a savings on total delivery fees rather than paying a per delivery fee in option 1.

COMPANY is seeking guidance from the Department as to whether its delivery charges and/or pick-up charges are considered part of the selling price of the groceries upon which it computes its Retailer’s Occupation Tax (“ROT”) liability. In addition, if the delivery charges and/or pick-up charges are considered part of the selling price of the groceries, then COMPANY is seeking guidance as to the proper ROT rate to charge its customer when the customer order has a mix of high rate and low rate products. COMPANY’s current method is to determine the percentage of cost for high rate vs. low rate products and use the larger category as the appropriate tax rate for the delivery fee. For example, if the low rate items represent 75% of the cost of the basket, COMPANY uses the low rate.

Regulation Section 130.415(d) provides as follows:

If seller and the buyer agree upon the transportation or delivery charges separately from the selling price of the tangible personal property which is sold, then the cost of the transportation or delivery service is not a part of the “selling price” of the tangible personal property which is sold, but instead is a service charge, separately contracted for, and need not be included in the figure upon which the seller computes his ROT liability. Delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the seller requires a separate charge for delivery and so long as the charges designated as transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery.

In *Kean v Wal-Mart Stores, Inc.*, 235 Ill.2d 351 (2009), the Illinois Supreme Court in interpreting Section 130.415(d) determined that Wal-Mart had properly charged sales tax on shipping charges included on an Internet purchase made by a Wal-Mart customer. In this case, when a Wal-Mart customer made an internet purchase, the customer was presented with several shipping options at various rates, provided through third-party shippers such as UPS and FedEx.

The Illinois Supreme Court noted that the primary inquiry was whether shipping was separately contracted for by the parties. If there was no separate agreement for shipping, then the charges must be included in the retailer’s gross receipts and are subject to tax.

The Court held that outgoing transportation and delivery charges are part of the gross receipts subject to the ROT when an “inseparable link” exists between the sale and delivery of merchandise. An inseparable link exists when (1) the transportation and delivery charges are not separately identified to the purchaser on the contract or invoice, or (2) the transportation and delivery charges are separately identified to the

purchaser on the contract or invoice, but the seller does not offer the purchaser the option to receive the property in any manner except by delivery from the seller (i.e., no pick-up option). In contrast, if the tangible personal property that the customer agreed to buy can be sold to the customer without the retailer rendering the delivery service, than an inseparable link does not exist, and the delivery charges should not be included in the selling price of the sale of tangible personal property.

In *Kean*, the Court held that there was an inseparable link between the sale by Wal-Mart and the delivery to the customers, because the delivery was not an option. The delivery was part of what was being sold and therefore was part of the selling price.

In a recent ruling, the Department found that pursuant to Section 130.415 as interpreted by *Kean*, when charges for outgoing transportation and delivery are separately identified and the purchaser has the option to pick up the tangible personal property, outgoing transportation and delivery is considered a service separate and distinct from the sale of tangible personal property that is being transported or delivered and charges for such services should be excluded from the gross receipts subject to the ROT. Illinois Private Letter Ruling ST 15-0014 PLR 10/23/2015. It is unclear from the facts of *Kean* and ST 15-0014 PLR whether the pick-up option was for a charge or no charge. In addition, it is unclear from the holdings of *Kean* and ST 15-0014 PLR that if a pick up option is available, whether the delivery option(s) and pick up option are all considered services separate from the sale of the tangible personal property excluded from gross receipts subject to the ROT.

In this case, we offer the following example which will hopefully make the situation clearer. A customer places on order for \$100 in groceries and upon checkout, the customer has the following options: (1) pay \$5.99 to have the order delivered to the customer's residential address/commercial address, or (2) pay \$2.99 to pick-up the order at the local bricks and mortar COMPANY location (PUP). Charges for outgoing transportation and delivery are separately identified by COMPANY and the purchaser has the option to pick up the groceries at the bricks and mortar location (PUP) in Illinois for a charge. If the customer had instead paid \$45 up front for the 3-month PRODUCT, during checkout, charges for delivery are separately identified but the customer is given a credit to offset the delivery charges. The question being asked is what, if any of the types of charges for obtaining/receiving the groceries are subject to tax. As we discussed, COMPANY's primary interest is complying with Illinois law as to the taxability of these charges. Therefore, COMPANY respectfully requests that the Department consider the facts outlined in this letter and incorporate the taxability of COMPANY's delivery and pick-up charges in the new regulation; provide a specific response in a Private Letter Ruling; or at a minimum provide a general response in a General Information Letter.

I am more than happy to provide additional facts or further discuss any questions you have. So please don't hesitate to contact me. Thanks in advance.

#### **DEPARTMENT'S RESPONSE:**

The Department's regulation regarding transportation and delivery charges, 86 Ill. Adm. Code 130.415, was recently amended in light of the decision in *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 919 N.E.2d 926 (2009). At issue in *Kean* was whether shipping charges for certain Internet purchases of tangible personal property were subject to Illinois sales tax. The court found that an "inseparable link" existed between the sale and delivery of the merchandise plaintiffs purchased from Wal-Mart's Internet store. Thus, the court in *Kean* concluded that the outgoing transportation and delivery charges were part of the gross receipts subject to the Retailers' Occupation Tax. 86 Ill. Adm. Code 130.415(b)(1)(B)(i). An inseparable link exists when (a) the transportation and delivery charges are not separately identified to the purchaser on the contract or invoice or (b) the transportation and delivery charges are separately identified to the purchaser on the contract or invoice, but the seller does not offer the purchaser the option to receive the property in any manner except by the payment of transportation and delivery charges added to the selling price of an item (e.g., the seller does not offer the purchaser the option to pick up the tangible personal property or the seller does not offer, or the purchaser does not qualify for, a free transportation and delivery option). 86 Ill. Adm. Code 130.415(b)(1)(B)(ii). In contrast, if the tangible personal property that the customer agreed to buy can be sold to the customer without adding a transportation or delivery charge to the selling price of the item, then an inseparable link does not exist and the delivery charges should not be included in the selling price of the tangible personal property. 86 Ill. Adm. Code 130.415(b)(1)(B)(ii)-(iii). *Kean*, 235 Ill. 2d at 375.

If a seller of tangible personal property offers the purchaser free transportation and delivery of the property, qualified transportation and delivery of the property for which the purchaser qualifies (e.g., purchases over \$25 qualify for free shipping, and the purchaser spends more than \$25), or the option to pick up the property, any separately identified transportation and delivery charges chosen by the purchaser (e.g., amounts paid for expedited transportation and delivery) will be nontaxable, as long as the selling price of the tangible personal property neither increases nor decreases depending on the method chosen by the purchaser to obtain the merchandise. If the selling price of the tangible personal property increases or decreases depending on the method chosen by the purchaser to obtain the merchandise, any transportation and delivery charges imposed will be subject to Retailers' Occupation Tax to the extent those charges exceed the actual cost of outgoing transportation and delivery. 86 Ill. Adm. Code 130.415(b)(1)(C).

Outgoing transportation and delivery charges are charges for the final transport or delivery of tangible personal property from the possession and control of the seller to the possession and control of the purchaser. Costs incurred by the retailer in moving property to some point from which the property will be delivered or shipped to the customer, or picked up by the customer, are not outgoing transportation and delivery charges; they are incoming transportation and delivery costs and are part of the retailer's costs of doing business. Any amounts the retailer charges a customer for moving the property cannot be deducted from gross receipts from that sale. 86 Ill. Adm. Code 130.415(b)(1)(D)(iii)-(iv) & 130.415(b)(2)(A). Incoming transportation and delivery costs are a business expense to the retailer and may not be deducted from the gross receipts, even though the retailer may pass those costs on to its customers by quoting and billing those costs separately from the price of the tangible personal property sold. 86 Ill. Adm. Code 130.415(b)(2)(B).

Tax on delivery charges may be calculated for each separately listed item on an invoice if the invoice itemizes the delivery charge for the items. When an invoice contains a lump sum delivery charge for separately listed items, the lump sum delivery charge will not be taxable if the selling price

of the items for which delivery is nontaxable is greater than the selling price of the items for which delivery is taxable. 86 Ill. Adm. Code 130.415(b)(1)(E).

If a retailer has determined that the delivery charges are part of its gross receipts, then the retailer must determine if any exemptions apply and, if not, determine the appropriate tax rate for that transaction. See 86 Ill. Adm. Code (b)(1)(F)(ii) through (vi).

In your example, a customer has two options to obtain the tangible personal property: (1) pay \$5.99 to have the order delivered to the customer's address, or (2) pay \$2.99 to pick up the order at a local COMPANY location. Charges for transportation and delivery are separately identified by COMPANY on customer bills.

Under the second option, the customer is charged \$2.99 if the customer picks up the groceries at a local COMPANY location. COMPANY must transport the groceries from its CITY 2 warehouse to the local COMPANY location for customer pickup. Costs incurred by COMPANY in moving the groceries from CITY 2 to the local COMPANY location are not outgoing transportation and delivery charges; they are part of the retailer's costs of doing business. Any amount COMPANY charges a customer for moving the property cannot be deducted from gross receipts from that sale. 86 Ill. Adm. Code 130.415(b)(1)(D)(iii)-(iv).

Regardless of how COMPANY wishes to label the \$2.99 charge on the customer's bill, the charge to the customer simply reimburses COMPANY for its costs of doing business and is not a charge for outgoing transportation and delivery. As such, this charge is subject to tax. Although the \$2.99 charge is taxable as a cost of doing business, the charge nevertheless demonstrates that the customer has a pickup option. Because the customer has a pickup option under option 2, the charges for outgoing transportation under option 1 are not included in gross receipts.

COMPANY is seeking guidance as to the proper tax rate to charge its customer when an order for groceries has a mix of high rate and low rate products. You state that COMPANY's current method is to determine the percentage of costs for high rate products and low rate products and use the larger category as the appropriate tax rate for the delivery fee. For example, if the low rate items represent 75% of the cost of the basket, COMPANY uses the low rate. It is unclear what you mean by the term "costs." In order to qualify for the low rate, the total "selling price" of the tangible personal property that is taxed at the low rate must be greater than the total selling price of the tangible personal property that is taxed at the high rate. 86 Ill. Adm. Code 130.415(b)(1)(F)(v).

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at [www.tax.illinois.gov](http://www.tax.illinois.gov) or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters  
Chairman, Private Letter Ruling Committee

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